FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 30

THE COLORADO NATIONAL BANK OF DENVER AND GERTRUDE HENDRIE GRANT, Executors of the Estate of EDWIN B. HENDRIE, Deceased, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

REPLY BRIEF FOR PETITIONERS.

MORRISON SHAFROTH,
Denver, Colorado,
Counsel for Petitioners.

Of Counsel:
W. W. GRANT,
HENRY W. TOLL,
RANGER ROGERS,
Denver, Colorado.

PRESS OF BYRON S. ADAMS, WASHINGTON D. C.

INDEX.

CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 30

THE COLORADO NATIONAL BANK OF DENVER AND GERTRUDE HENDRIE GRANT, Executors of the Estate of EDWIN B. HENDRIE, Deceased, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

REPLY BRIEF FOR PETITIONERS.

The Government's brief clearly illustrates the wisdom of the general rule that a finding by the Board of Tax Appeals on a question of fact is final.

In this case there was a stipulation of certain facts and stipulated evidence of certain witnesses as to further pro-

bative facts. The Government contends that a consideration of this evidence and of the stipulated facts requires a contrary conclusion to that reached by the Board of Tax Appeals on the ultimate fact.

> "To do so would require the court to find the ultimate fact from the probative facts and thereupon substitute its conclusions for the conclusion of the Board of Tax Appeals and reverse the decision because it had reached a different conclusion as to the ultimate fact. This cannot be done." *Tricou* v. *Helvering,* (C. C. A. 9) 68 F. (2d) 280, 282. See also *Wilson* v. *Merchants Loan & Trust Co.,* 183 U. S. 121.

The Government says the evidence was undisputed. True. But the meaning of the evidence and the inferences to be drawn from it are very definitely in dispute.

The particular evidence which the Government deems contrary to the conclusion reached by the Board is the evidence as to the donor's motive in making the gift. It claims that this evidence shows that donor's only motive for making the gift was to provide for his daughter after his death (Br. pp. 11, 33), and that his statement that he wanted to save the property from the vicissitudes of his market speculations must be construed as meaning that he only wanted to save it in order to provide for his daughter after his death (Br. p. 30) and by inference that but for that fact he wouldn't have wanted to save it at all.

We believe this to be an unjustified and strained interpretation of the evidence. Certainly the Board of Tax Appeals did not make any such finding of fact.

As we interpret the evidence the donor when he found himself imbued with the speculative fever of the bull market of 1927 became alarmed lest he should involve his entire fortune in this gamble. He may be assumed to have had the normal human desire common to all not to lose everything he had. Moreover he wanted to avoid the discomfort of the worry which would have accompanied the risking of his entire fortune. He also felt a certain obligation to

make provision for his daughter. He went to his banker, discussed her "then present and future needs" and directed the drawing up of the trust instrument. Three years later when the crash had come he told his son-in-law that despite his speculations his daughter had been provided for by this trust. His conversation at the drawing up of the instrument save for his expressed desire to play the market was no different than would be necessary in any case to direct the drafting of such an instrument.

The Government construes the testimony as meaning that donor *avowed* that his motive and purpose in making the transfer was to provide for his daughter after his death (Br. pp. 11, 33). We do not so construe the testimony nor did the Board of Tax Appeals find any such fact.

It is on the basis of this supposed avowal of motive that the Government attempts to distinguish the long life of cases cited in our main brief. Those cases demonstrate that the mere *intent* to provide for one's beneficiaries after death as shown by the trust instrument itself does not make the gift taxable.

We submit that the only way even such an *intent** can be spelled out of the evidence in this case is by inference from the terms of the trust instrument and in that respect it differs not at all from *Shukert* v. *Allen*, 273 U. S. 545, *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *McCormick* v. *Burnett*, 283 U. S. 784, and other cases cited in our principal brief.

There is no mention in the conversation with the trust officer of any motive of providing for his daughter after death. And certainly there was no avowal that that was his dominant motive or his only motive.

Before the Board of Tax Appeals the Government made no such claim of avowed motive. As the Board said (R. 28):

> "The Commissioner relies upon the fact that the income was to be accumulated and added to corpus dur-

*To be distinguished from motive.

ing the life of the donor and consequently the beneficiaries were to receive nothing until after the death of the decedent. He argues from this circumstance that the transfer was a substitute for testamentary disposition made in contemplation of death."

In the Circuit Court of Appeals the argument was based on the same proposition (p. 5 Government's Br. U. S. C. C. A. #1566):

> "Since the trust provided for the accumulation of the income until his death, however, *it must necessarily be inferred** that his purpose was to provide for his daughter in the event of loss through speculation not during his lifetime but upon his death."

That correctly states the evidential basis on which the Government claimed the right to draw the inference of contemplation of death.

The Government's brief, however, just filed in this court is replete with such expressions as (Respondent's Br., p. 11):

> "The court looked to the terms of the transfer merely in order to see whether the decedent had carried out his *avowed** purpose to make sure provision for his daughter and her children after his death."

(Page 33)

> "It is to be observed in this connection that in stating the supposed analogy the petitioners wholly failed to state the full purpose of the decedent as declared by him to the trust officer, namely that he desired to conserve the property *only** in order that he might provide for his daughter and her children after his death."

This is merely an attempt to substitute its interpretation of the evidence for that of the Board and to use that interpretation for the purpose of reaching a different conclusion

---

*Italics our own.

than reached by the Board. This cannot be done. The exact language of the witness on this point, Mr. Bancroft (R. 41), read as follows:

> "Mr. Hendrie expressed * * * the thought that after he made this trust agreement he would then have his more speculative securities left and would feel free for the rest of his life to speculate in whatever securities he might wish and that his purpose in making the trust agreement was to transfer the trust corpus in the manner provided for in said trust deed and thereby putting it entirely beyond his own power to otherwise dispose of the same contrary to the provisions of the said trust deed and to remove it from the vicissitudes of his speculations. Mr. Hendrie expressed doubt as to the stability of the market and expressed a desire to 'play on the market' more actively and in a more speculative way than in the past. Mr. Hendrie often spoke of his intention of thus occupying himself for the rest of his life, and in giving less time to the Hendrie and Bolthoff business."

He also discussed "the then present and future needs of his daughter" (R. 41), and * * *

> " * * * how he might best transfer a part of his assets in the interest of his daughter, Gertrude Hendrie Grant, her descendants and for her heirs, so that whatever might happen to his financial affairs in the future such persons would be provided for." (R. 41)

While the Government throughout its brief speaks of donor's *avowed* purpose of providing for his beneficiaries after death, it not only points out no evidence of such avowal but in effect admits there was no such avowal. It says (Br. pp. 30, 31):

> "It cannot be said upon the basis of any evidence in the case that the decedent intended to make provisions for the objects of his bounty during his lifetime. If that had been his purpose he could and would have made outright gifts to them or would have made provisions for the payment of the income to them during

his lifetime or otherwise made that purpose effective. The transfer he made makes absolutely no provision for them during his lifetime."

That is precisely the same argument that was made by the Government in *Shukert v. Allen* (*supra*), *Reinecke* v. *Northern Trust Co.* (*supra*), *McCormick* v. *Burnet* (*supra*), *Becker* v. *St. Louis Union Trust*, 296 U. S. 48, and the other cases which it seeks to distinguish on the ground that here there was an avowal. In fact, of those cases the Government (Br. p. 26) admits:

> "The effect of this dicta and decision is merely that the fact of transfer containing provisions for the distribution of the property at or after death is not alone sufficient to show that the actuating purpose for the transfer was to provide for the objects of bounty at death and the disposition is consequently in contemplation of death."

Our point is that the Government's case as presented to the Board of Tax Appeals and as shown by the evidence is nothing more than a claim that an irrevocable gift in trust which accumulates the income during donor's life is *per se* in contemplation of death.

Having inferred from the evidence something that was not found there by the Board of Tax Appeals, to-wit, this avowal outside of the trust instrument, and having further read into the evidence a further avowal that "he desired to conserve the property only in order that he might provide for his daughter and her children after his death" (Br. p. 33)—something that the Board of Tax Appeals neither found nor inferred from the evidence—the Government jumps to the conclusion that the sole motive for the transfer was to provide for his daughter after his death and argues the law as though the question was whether a transfer, the sole motive for which was to make such provision, is the same motive that leads to a testamentary disposition (Br. p. 15).

It wholly disregards the evidence of donor's fear of the market and his desire to save the property from loss during his lifetime and his desire to avoid worry. None of these are testamentary motives in the remotest sense. But it would have this court weigh the testimony, disregard those factors and by so doing arrive at an ultimate fact contrary to that arrived at by the Board of Tax Appeals.

Intent and Motive Are Not Synonymous.

> "The Government contends that, in view of the fact that the undisputed evidence shows that the decedent *intended** by the transfer to make sure provision for his daughter and her children after his death, the case turns solely upon the classification of the assigned *motive*.*" (Br. pp. 10 and 11)

By an utterly indiscriminate use of the words "intent," "motive" and "purpose" throughout the brief it arrives at the conclusion that if there is an intent to provide for the beneficiaries after donor's death, or a purpose to so provide by the trust instrument, the intent is necessarily the dominant motive for the transfer.

That intent and motive are not in law synonymous seems fairly clear.** Take the old class-room type of illustration. Mr. X is walking down a lonely street on a dark night. He is accosted by a burly beggar, who asks him for a quarter. He hands the beggar a quarter. When he does so, his intent is to give the quarter to the beggar. His motive may be fear, it may be a charitable instinct, or it may be the desire for the self-satisfaction that one obtains by such a gift. The fear in turn may be influenced (1) by the fact that he is going to take out a life insurance policy the next day and does not want to be injured before that is taken care of, (2) by a general desire not to suffer the physical

---

*Italics our own.

**Intent is the foreseen result of an act. Motive is the reason—the consideration which determines choice or induces action.

discomfort of being beaten up, (3) just plain cowardice. Each one of these influences may in turn be traced back to other possible underlying factors.

Applying this method to the present case, the Board of Tax Appeals had before it this state of facts: donor is about to plunge in the stock market; he makes a transfer in trust of part of his property; the trust instrument provides for an accumulation of the income until after his death, thereafter to his daughter and her heirs. He directs the trust officer as to the disposition of the property. His intent is to make the specific transfer in trust, which he does make. His motive is fear of loss—the desire to preserve the property from the vicissitudes of his speculations. Back of this motive there may be *arguendo* (1) simply the natural human desire not to lose everything he had spent a lifetime of hard work in acquiring. This is a universal desire which exists whether one has any particular use he wants to put the money to or not. (2) The desire not to lie awake nights worrying about the speculations—the all inclusive human instinct to avoid discomfort. (3) The desire to be relieved of the burden of managing a part of his estate since he has reached the conclusion that he is likely to gamble it away if he keeps it. (4) Pride—the desire not to appear a complete fool if the market crashed and everything was wiped out, and (5) The desire to do some particular thing with his money—as shown by the trust instrument. It may have been permissible for the Board of Tax Appeals to infer from the evidence showing his fear of his speculative tendencies that any one or all of the above impulses contributed to his fear.

In effect, the Government's position, however, is that the only possible reason why he didn't want to lose all of his property was that he wanted it to go to his daughter after his death. We submit that the contention is contrary to human experience. People don't want to lose their property whether they have anybody to leave it to or not. Nobody throws his money in the fire.

There are at least two constant human instincts in re-
pect of property—(1) the desire not to have it lost or
estroyed, and (2) the desire to provide for one's family.
Ve submit that the two exist independently of one another.

In its brief before the Board of Tax Appeals the Gov-
rnment itself recognized that the motive to preserve prop-
rty from loss in this case was independent and was not
ontemplation of death. It said (p. 25, Respondent's Br.
. T. A. 78040)

> "While it is possible that the desire to protect a portion of his fortune from temptation to speculate with it may have been one of the motives for the transfer, it is not believed it was the dominant or principal motive."

We submit that it was the function of the Board of Tax
ppeals to draw the inferences and interpret the evidence.
did not draw the inference on which the Government now
elies.

The Government Misconstrues Our Brief.

The Government makes much of the statement on page
7 of our brief

> "In determining the proximate cause of this *inter vivos* transfer the court will search the record in vain to find anything to indicate that it would have been made but for Mr. Hendrie's fear of the market. Love of family and desire that his daughter have something after his death may have contributed to that fear but the fear caused the *inter vivos* transfer."

It claims this is a concession that desire to provide
r his children after death was *the* contributing cause (Br.
p. 12, 27) and throughout the brief assumes it was the
nly cause. We submit there is no justification for such
interpretation. The evidence does not show it to be a
ct. Again, on page 34, it defines our position as

"The contention that a transfer springing from the purpose to provide for the objects of bounty at death is not made in contemplation of death * * *."

Our brief does not concede that the transfer sprang from any such purpose, nor does the evidence show that it did, nor did the Board of Tax Appeals find that it did. Our contention throughout was that the gift sprang from the motive of preserving his property from loss and avoiding the fear and worry that would have been involved in risking it all. Again, (page 38) our position is described as:

"The petitioner's contention that the *motive* to provide for objects of bounty at death is immaterial."

The Government clearly fails to distinguish between intent and motive. Our position was and is that an intent is shown by the trust instrument here as in the *Reinecke case* and other cases cited but that the motive is something entirely different. The Government's whole brief, we believe, to be a misconception of our position, largely because of its confusion as to the legal concept of intent and motive and its assumption of certain inferences from the evidence which we do not believe are justified.

Contemplation of Death is a Question of Fact and Was Treated as Such in This Case.

It is settled law as shown by the authorities in our opening brief and as recognized by the lower court that contemplation of death is a question of fact to be determined by the Board of Tax Appeals. The Board of Tax Appeals made a general finding that the transfer here was not in contemplation of death. A finding on that fact was the only finding asked for by the Government.

The Government's request reads as follows:

"Respondent requests the following finding of ultimate fact: That the transfer in respect of the trust created by instrument dated January 7, 1927 (Ex. C)

> was made in contemplation of or intended to take effect in possession or enjoyment at or after his death within the meaning of Section 302 C of the Revenue Act of 1926." (Respondent's Br. B. T. A. 78040, p. 13.)

The Government now says, however, that this must be construed in this case not as a question of fact but as a question of law, because the Board of Tax Appeals relied on the opinion of the Supreme Court in *United States* v. *Wells*, 283 U. S. 102 in its determination. We submit that ever since that decision the Board of Tax Appeals in all cases has looked to that opinion for guidance as to the meaning of contemplation of death. There is nothing whatever in the Board's opinion to indicate that it misinterpreted the Wells case. The Court of Appeals simply drew a different inference from the evidence than did the Board of Tax Appeals, and the Government in this case is asking this court to draw a different inference from the evidence, as to donor's desire to avoid the dangers of market speculation, than did the Board of Tax Appeals. But "to draw inferences, to weigh the evidence and to declare the result was the function of the Board," *Helvering* v. *National Grocery Co.*, 304 U. S. 282, 294.

The Government complains that no special findings were made. (Respondent's Br. p. 17.) But it only asked for the general finding as to whether the gift was in contemplation of death.

Memorandum of the Board of Tax Appeals Constituted a Finding of the Ultimate Fact that the Gift Was Not in Contemplation of Death.

That the Board of Tax Appeals may make its report in the form of special findings, an opinion, or a memorandum opinion is settled law. In *Emerald Oil Co.* v. *Commissioner* (C. C. A. 10), 72 F. (2d) 681, 683, the court said:

> "By the use of the disjunctive 'or' Congress manifested the intention to leave it optional with the Board to make its report in the form of special findings, an

opinion, or a memorandum opinion. See House Reports, Vol. 1, No. 2, page 30, 70th Congress, First Session. Under Section 907 (b) as amended a written opinion may perform the function of a finding of fact, and we may look to it 'to determine what the decision is and the facts upon which it is based.''

To the same effect are:

Insurance & Title Guaranty Co. v. *Commissioner* (C. C. A. 2) 36 F. (2d) 842. Certiorari Denied, 281 U. S. 748.

California Iron Yards Co. v. *Commissioner*, 1931 (C. C. A. 9), 47 F. (2d) 514, 518.

Sheppard & Myers, Inc., v. *Commissioner*, 1930 (C. C. A. 3), 45 F. (2d) 50, 51.

Olson v. *Commissioner*, 1933 (C. C. A. 7), 67 F. (2d) 726, 728.

Commissioner v. *Crescent Leather Co.*, 1930 (C. C. A. 1), 40 F. (2d) 833, 834.

The Finding of This Ultimate Fact Carries With it the Finding of All Facts Necessary to Sustain the Judgment.

In *Tricou* v. *Helvering* (C. C. A. 9), 68 F. (2d), 280, there was involved an appeal from the decision of the Board of Tax Appeals. In discussing the effect of the finding of an ultimate fact. The court said (p. 282):

> "If the appellate court has no power or authority to determine the ultimate facts from the probative facts, it would seem to follow that, where the findings of the Board of Tax Appeals contain the necessary ultimate facts to support the judgment, the court will not determine whether the probative facts stated in the findings would lead to a different conclusion as to the ultimate fact. To do so would require the court to find the ultimate fact from the probative facts and thereupon substitute its conclusion for the conclusion of the Board of Tax Appeals and reverse the decision because it had reached a different conclusion as to the ultimate fact. This cannot be done. This would seem to follow from *Wilson* v. *Merchants' Loan & Trust Co.*,

183 U. S. 121, 22 S. Ct. 55, 57, 46 L. Ed. 113, where the parties entered into a stipulation as to the facts and the cause was submitted to the trial judge on the stipulation. The court made no special findings of fact, but made a general finding. After quoting from the statement of facts the court said:

" 'This statement has been referred to for the purpose of understanding the materiality of certain facts not found or agreed upon, the failure to do which prevents our use of the statement in the decision of the case. * * * When there are special findings they must be findings of what are termed ultimate facts, and not the evidence from which such facts might be but are not found. If, therefore, an agreed statement contains certain facts of that nature, and in addition thereto and as part of such statement there are other facts of an evidential character only, from which a material ultimate fact might be inferred, but which is not agreed upon or found, we cannot find it, and we cannot decide the case on the ultimate facts agreed upon without reference to such other facts. In such case we must be limited to the general finding by the court. We are so limited because the agreed statement is not a compliance with the statute.

" 'As to what is necessary in special findings or in an agreed statement of fact, the authorities are decisive. It is held that upon a trial by the court, if special findings are made, they must be not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties; and if the finding of facts be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by a bill of exceptions; and in such case the bill cannot be used to bring up the whole testimony for review, any more than in a trial by jury. Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608 * * *

" 'It has, however, been held that where there was an agreed statement of facts submitted to the trial court and upon which its judgment was founded, such agreed statement would be taken as an equivalent of a special finding of facts. Supervisors v. Kennicott, 103 U. S. 554, 26 L. Ed. 486. But as such equivalent, there must of course be a finding or an agreement upon all ultimate facts, and the statement must not merely pre-

sent evidence from which such facts or any of them may be inferred.'

"It will be observed that in this latter case the trial court had made a general finding in favor of the appellee; that the parties had agreed upon certain ultimate facts and in addition thereto certain evidentiary facts; that the appellant claimed that the statement of facts including the ultimate facts and the evidentiary facts required a contrary conclusion to that reached by the trial judge. The Supreme Court declined to consider the evidentiary facts for the purpose of determining whether the ultimate facts derived therefrom, plus the ultimate facts stipulated, required a reversal of the judgment. In the case at bar we are asked to weigh the evidentiary facts and reverse the finding of the Board of Tax Appeals of the ultimate facts, which is exactly what the Supreme Court refused to do in the case just cited. Wilson v. Merchants' Loan & Trust Co., supra.

"The finding of the Board of Tax Appeals on the only ultimate fact in issue is as follows:

"'In this process of refinancing, petitioner's loss occurred in 1922. Can it be said that this loss is such a loss as petitioner is entitled to use in determining a "net loss" within the meaning of Section 204 of the Revenue Act of 1921 and bring forward and use as a deduction in determining her net income for 1923? We do not think so. * * *'"

See also:

Winnett v. *Helvering* (C. C. A. 9) 68 F. (2d) 614, 615.

Compare:

Eastman Kodak Co. v. *Gray*, 292 U. S. 332.
Fleischmann Construction Co. v. *United States*, 270 U. S. 349.
Harvey Co. v. *Malley*, 288 U. S. 415

holding that in the absence of special findings the general finding of the court is conclusive upon all questions of fact.

In *Palmer* v. *Commissioner*, 302 U. S. 63, 70, this court, referring to a finding of the Board of Tax Appeals, said:

> "* * * The findings are inferences which the Board was free to draw from all facts and circumstances disclosed by the record. Such a determination of fact is not to be set aside by a court even if upon examination of the evidence it might draw a different inference."

The principle is also well established that evidential facts may not be used to overcome the finding of ultimate fact unless they compel an opposite conclusion as a matter of law.

> *Almours Securities, Inc.* v. *Commissioner*, (C. C. A. 5th, 1937) 91 F. (2d) 427.

From these established principles it is apparent that on review of a decision by the Board of Tax Appeals all of the evidence must be construed in the light most favorable to the conclusion reached by the Board. It is not sufficient that the reviewing court construes the evidence differently than did the lower court, or would have decided the case differently than did the lower court. The Board of Tax Appeals in effect found that the controlling motive for Mr. Hendrie's gift was his desire to save his property from loss in the stock market. If a desire to give it to his daughter after his death would constitute contemplation of death, then the Board in effect found that such was not the controlling motive in making the gift, but that simply the general desire common to all to preserve property from loss was the motivating force. Such is the necessary effect of the general principles above outlined. The mere statement by the donor that he contemplates speculation in the market and desires to preserve a part of his property from the dangers thereof is amply sufficient to sustain such a finding, and it is hardly necessary for him to say that he is imbued with the universal desire of preserving property

from loss—a desire that exists regardless of what one is going to do with the property when it is saved from danger.

The Government's Argument as to the Testamentary Nature of the Gift.

The Government contends that since a will had been drawn two years before the gift with provisions somewhat similar to the provisions of the trust, and since the trust did withhold from the beneficiary the use of the property until after donor's death, that it was necessarily testamentary, and if testamentary then necessarily in contemplation of death. This again involves a question of fact, and of the inferences to be drawn from the evidence. It might depend to some extent on how exactly the trust instrument resembled the will, on how close together in point of time they were executed, on whether they were considered together, etc. In this particular case there is a very considerable difference between the trust instrument and the will. In the will numerous specific bequests were made, definite monthly payments were to be made to the daughter regardless of the amount of income, definite annual payments were to be made to named grandchildren regardless of the amount of the income. In the trust deed the daughter gets so much of the income as she may call for, but none of the principal, and the grandchildren get nothing until her death. The will was executed two years prior to the date of the trust deed and was never mentioned at the time the trust deed was executed. The argument seems to be, however, that any instrument withholding the actual use of the income until the donor's death is testamentary. That precise argument has been made over and over again to this court.

In *Nichols* v. *Coolidge*, 274 U. S. 531, it was stressed at great length that the donor had made a gift in trust, retaining a life interest in herself. Mr. Justice McReynolds outlined the Government's contention as follows (page 540):

"For the United States it is said * * * that what Congress intended was to provide a measure for the tax which would operate equally upon all those who made testamentary dispositions of their property, whether this was by will or intestacy or only testamentary in effect; * * *. And the conclusion is that the measure adopted is reasonable, since the specified transactions are testamentary in effect.

"But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentory and it bears no substantial relationship to the transfer by death."

In *May* v. *Heiner*, 281 U. S. 238, the gift reserved to the donor and her husband the income for life, remainder to her daughter after her death. The court said (page 243):

"The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentory in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. * * *"

In *Bingham* v. *United States*, 296 U. S. 211, 216, 80 L. ed. 160, *the Government argues* (page 162, L. ed.): "Life insurance is inherently testamentary in character. The policies herein are particularly so because of the contingent character of the beneficiaries' interest and it is therefore appropriate to include the proceeds thereof in the insured's gross estate.". In rejecting the contention the court said:

"These principles establish that the title and possession of the beneficiary was fixed by the terms of the policies and assignments thereof beyond the power of the assured to affect many years before the act here in question was passed. No interest passed to the beneficiary as the result of the death of the insured. His death merely put an end to the possibility that the predecease of his wife would give a different direction to the payment of the policies."

Over and over again in the line of cases in which the Government was contending for the taxability of transfers in trust where the income was withheld from the beneficiary until after donor's death the claim was advanced that the gifts were testamentary. In *May* v. *Heiner*, 283 U. S. 238, *the Government in its brief in this court* (No. 311, page 7) *used this statement*: "The general characteristics of a testamentary disposition, putting aside matters of form, are that the property go over at the death of the testator and that during his lifetime he have the possession, enjoyment or control."

In *Burnett* v. *Northern Trust Co.*, 283 U. S. 782, and in the *Morsman* case, 283 U. S. 783, the same contention was advanced and again rejected by this court. And in *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, *the Government in its brief* (No. 262, page 19) *said*: "The tax here is upon the transfer of the corpus that was withheld from the beneficiaries until the decedent's death. Accordingly so far as a corpus is concerned, the decedent had no motive associated with his own life. On the contrary it was associated with his death, and this is properly treated as a testamentary disposition. Furthermore, although the court declared evidence was lacking that decedent was actuated by any thought of death, such motive clearly appears from the actual disposition of the corpus to take effect at and not before decedent's death."

Again this court rejected the contention.

The real meaning of the court's use of the term "testamentary" is evidenced in its opinion in the case of *Commissioner* v. *Bullard*, 303 U. S. 297. In that case having just held in *Hassett* v. *Welch*, 303 U. S. 303, that a gift reserving a life estate to donor made prior to the joint resolution of March 3, 1931, was non-taxable, the court went on in the case of *Bullard* v. *Commissioner* (*supra*) to say that

Congress may treat such a gift as testamentary by an act directly taxing it. Said the court (at p. 301, last sentence):

> "* * * A further vindication of the exaction is authority of Congress to treat as testamentary, transfers with reservation of a power or an interest in the donor. The legislative history of the Joint Resolution, to which reference is made in Hassett v. Welch, post, p. 303, decided this day, demonstrates that the purpose of the legislation was to prevent avoidance of estate taxes. As has been said by the Court of Appeals of New York: 'It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is the transfer with reservation of life estate.' * * * As applied to a trust created after its enactment the Joint Resolution does not violate the Fifth Amendment."

Construing the two cases together it is perfectly clear that the court considers such gifts not *per se* testamentary and as in contemplation of death, but that it considers such gifts within the reach of the taxing power of Congress if it specifically designates the gifts as taxable. The indication is very definite that they are not taxable as testamentary gifts under the contemplation of death clause but are taxable if specifically designated by statute. Not only was the gift in this case made prior to the enactment of this joint resolution, but it does not even fall within its terms and so would not be taxable had it been made subsequent to the enactment of such law.

As we have pointed out in our main brief, the essential characteristic of a testamentary gift is that it remains ambulatory until the death of the testator, and that it confers no rights until that time. Nothing whatever passes from the testator until his death. On the other hand, an *inter vivos* gift becomes complete the instant it is made. It passes beyond the power of the donor. It fixes rights. To contend that a gift is in contemplation of death because it is testamentary and that it is testamentary because it with-

holds from the beneficiaries the actual use and enjoyment of the property until donor's death is simply a roundabout way of saying that all gifts *inter vivos* in which the possession and enjoyment is withheld until donor's death are in contemplation of death. That such is not the law we believe we have abundantly demonstrated.

Nor does the fact that one creating an *inter vivos* trust names as beneficiaries thereof the same persons formerly named in his will make the gift testamentary. Every gift must go to some one. It would be equally sound to contend that if the gift is made to someone other than is named in the will it is therefore made as a supplement to the will and to round out and complete it. Testamentary dispositions are not defined by looking to the persons to whom or the manner in which the property is given. If such were the case nearly all *inter vivos* gifts in trust would be held to be testamentary in effect. In the long list of cases cited in our main brief, the beneficiaries of the trust were almost uniformly the same persons who had been provided for by testator's will. But this was never deemed as indicating that the gift was testamentary and therefore in contemplation of death. The Government's argument (Br., pp. 34-38) based on *Milliken* v. *U. S.*, 283 U. S. 15, and *U. S.* v. *Wells*, 283 U. S. 102, depends entirely on the assumption that donor's dominant *motive* in this case was to provide for his beneficiaries after death. That, the Government says, is a testamentary motive. But the Board has found no such motive. Nor is there any evidence from which it could reasonably be inferred that such was the dominant motive. On the contrary the Board found that the gift was not in contemplation of death and clearly indicated its conclusion that fear of the market was the dominant motive. Nor did it infer from the evidence that this desire was a sole or dominating factor contributing to the fear. The human desire to preserve one's property is common to all and is reason enough for putting it in a safe place.

The Government's argument depends on the same false premise, and the same erroneous inferences from the evidence, that are inherent throughout its Brief.

CONCLUSION.

The Government in its brief has reconstrued the evidence, rejecting the evidence and inferences favorable to the Board's finding and giving weight only to those parts favorable to its legal theory. By confusing intent, motive and purpose, by drawing inferences from the evidence not found there by the Board of Tax Appeals, and by completely disregarding the Board's finding of fact, it attempts to reinterpret the evidence in this court in a manner which was not even suggested to the Board of Tax Appeals.

The only question of law before the Circuit Court of Appeals in this case was whether the fact that the trust instrument on its face provided for an accumulation of the income until after donor's death made the gift *per se* in contemplation of death. In its general finding of fact that the gift was not in contemplation of death the Board of Tax Appeals had disposed of all questions and inferences to be drawn from the evidence. Every question of motive was by this finding decided against the Government. If fear for his property may have been inspired by various motives the Board's finding means that it was not inspired by any motives which would spell contemplation of death. The sole question then is, does this accumulation of the income until after donor's death showing an intent (not a motive) to provide for beneficiaries after donor's death amount to contemplation of death? We have pointed out in our main brief that contemplation of death was a term designed to prevent evasion of the estate tax. It was aimed at those who, deliberately setting out to evade the tax and in expectancy of death, transfer their property for that purpose. It was linked in the statute with the presumption that gifts made within two years of death were in contemplation of

death. It naturally follows that under the principle of *expressio unius est exclusio ulterius,* gifts not made within two years of death are not presumed to be in contemplation of death. The time element was clearly deemed important as bearing on a man's expectancy of death.

A second provision of the statute dealt with the nature of the gift, and provided for the taxation of gifts intended to take effect in possession or enjoyment at or after death. It was clearly the Congressional idea that such gifts were not covered by the prior clause. When this court in *May* v. *Heiner* (*supra*) and later in *McCormick* v. *Burnett* (*supra*) and other cases held that this section only applied where the grantor's interest ceased at death, Congress quickly amended the law (Joint Resolution of March 3, 1931) to provide that if the gift withheld the possession and enjoyment until after donor's death *and* reserved a life interest to the donor the gift would be taxed. This is a clear indication that unless the life income was reserved to the donor it was immaterial whether the use and enjoyment was withheld from the beneficiary until donor's death. The gift simply was not taxable.

During the more than twenty years in which this contemplation of death provision has been in effect, the Treasury regulations have never claimed that either the accumulation of income or the intent to provide for beneficiaries after donor's death as shown by such accumulation made the gift taxable as in contemplation of death. The regulations are the Government's interpretation of the law. As a rule they interpret the statutes in the most favorable light for the revenues reasonably possible. If this intent made a gift taxable, it would have made taxable innumerable cases that have heretofore gone untaxed. During all the twenty years the Government has occasionally feebly advanced this contention in the lower courts, but in most of the cases it abandoned the claim before it reached the Supreme Court. In this particular case, as we pointed out in our main brief, in the original tentative findings by the

Commissioner it was not even claimed that Mr. Hendrie's gift was in contemplation of death. It was merely contended that it was intended to take effect in possession and enjoyment at or after death. In the final deficiency letter the contemplation of death ground was added as an afterthought. The law is well settled that "If doubt exists as to the construction of a taxing statute the doubt should be resolved in favor of the taxpayer." *Hassett* v. *Welch,* 303 U. S. 303; *Gould* v. *Gould,* 245 U. S. 151.

Is it possible in view of this history to say that the statute plainly and clearly creates a conclusive presumption that gifts the enjoyment of which is withheld from the beneficiaries till donor's death are in contemplation of death. We submit that it is not.

Respectfully submitted,

MORRISON SHAFROTH,
Denver, Colorado,
Counsel for Petitioners.

Of Counsel:
W. W. GRANT,
HENRY W. TOLL,
RANGER ROGERS,
Denver, Colorado.